

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

CLAYTON DWAIN STIPES v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hawkins County
No. 07CR0412 John F. Dugger, Jr., Judge

No. E2008-00760-CCA-R3-PC - Filed October 17, 2008

The petitioner, Clayton Dwaine Stipes, filed in the Hawkins County Criminal Court a petition for post-conviction relief. The post-conviction court summarily dismissed the petition as being time-barred, and, on appeal, the petitioner challenges the dismissal. In response, the State filed a motion contending that the petitioner's notice of appeal was not timely and that his appeal should be dismissed. In the alternative, the State requests that this Court affirm the trial court's ruling pursuant to Rule 20, Rules of the Court of Criminal Appeals because the petitioner's post-conviction petition was time-barred. Upon review of the record and the parties' briefs, we conclude that the petition was properly dismissed. Accordingly, the State's motion is granted and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., AND D. KELLY THOMAS, JR., JJ., joined.

Clayton Dwaine Stipes, Henning, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; and C. Berkeley Bell, Jr., District Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

The record before us reflects that on October 31, 1997, the petitioner pled guilty to second degree murder, and he received a sentence of twenty years, one hundred percent of which was to be served in confinement. Thereafter, on November 5, 2007, the petitioner filed a petition for post-conviction relief, alleging that his guilty plea was not knowing and voluntary because he was coerced and because he was not mentally competent at the time of his plea. The petitioner maintained that at the time of the plea, he "suffered from a serious mental disorder" which was left untreated. The petitioner also contended that the sentence as imposed by the trial court violated the dictates of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004) and Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007), in that the trial court applied enhancement factors not found by a jury.

The post-conviction court found that the petitioner's post-conviction petition was time-barred. Additionally, the court found that the petitioner's guilty plea and sentence resulted from a negotiated plea agreement and did not violate the dictates of Blakely and Cunningham.

On appeal, the petitioner challenges the post-conviction court's ruling, maintaining that his claim is not time-barred. Specifically, the petitioner argues that the involuntariness of his plea was "plain error [that] can be corrected at anytime," citing State v. Nix, 40 S.W.3d 459, 463 (Tenn. 2001), for the proposition that, in limited circumstances, the post-conviction statute of limitation may be tolled if a petitioner demonstrates that he is unable to manage his personal affairs or to understand his legal rights and liabilities. The petitioner also reiterated his Blakely complaint. In response, the State maintains that both the petitioner's post-conviction petition and his notice of appeal were untimely.

First, we agree with the State that the notice of appeal was not timely filed. Rule 3(b) of the Tennessee Rules of Appellate Procedure provides that a criminal defendant may appeal to this court following "a final judgment in a . . . post-conviction proceeding." Rule 4(a) of the Tennessee Rules of Appellate Procedure instructs that "the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from; however, in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice."

The post-conviction court's order dismissing the petition was filed on January 18, 2008. On March 6, 2008, the petitioner attempted to file a notice of appeal in this court. On March 26, 2008, the appellate court clerk's office mailed the petitioner a letter, informing him that he needed to file a notice of appeal in the post-conviction court. Thereafter, on April 10, 2008, the petitioner filed his notice of appeal in the correct court. Although we have determined that the petitioner's notice of appeal was untimely, this court may waive the timely filing. In the interest of justice, we will briefly address the petitioner's concerns.

Turning to the petitioner's post-conviction petition, we note that "[r]elief under [the Post-Conviction Procedure Act] shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2003). However, to obtain relief,

a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken, or if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred.

Tenn. Code Ann. § 40-30-102(a) (2003); see also Williams v. State, 44 S.W.3d 464, 468 (Tenn. 2001). The statute emphasizes that time is of the essence of the right to file a petition for

post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise. Tenn. Code Ann. § 40-30-102(a).

Clearly, the post-conviction petition was filed well outside the one-year statute of limitation. The petitioner maintains that the statute of limitation should be tolled because he was mentally incompetent during this time. The petitioner's statement of his incompetency is the only proof supporting his allegation. The petitioner correctly notes that, in limited circumstances, the post-conviction statute of limitation may be tolled for incompetent petitioners. Nix, 40 S.W.3d at 463. However, our supreme court has explicitly rejected the notion that "due process requires tolling for incompetency upon the *mere assertion* of a psychological problem." Id. (emphasis added). The Nix court

emphasize[d] that to make a prima facie showing of incompetence requiring tolling of the limitations period, a post-conviction petition must include specific factual allegations that demonstrate the petitioner's inability to manage his personal affairs or understand his legal rights and liabilities. Unsupported, conclusory, or general allegations of mental illness will not be sufficient to require tolling and prevent summary dismissal

Id. at 464.

In the instant case, the petitioner has not met his burden of establishing, by means other than summary allegations of mental illness, that he was unable to manage his personal affairs or understand his legal rights and liabilities. Therefore, there is no discernable reason in the record to toll the post-conviction statute of limitation.

Moreover, regarding the petitioner's Blakely claim, we note that the post-conviction court's order indicates that the petitioner's sentence was the result of a guilty plea, nullifying any potential Blakely error. See Keith T. Perry v. Glen Turner, Warden, No. W2007-01176-CCA-R3-HC, 2008 WL 185810, at *3 (Tenn. Crim. App. at Jackson, Jan. 22, 2008), perm. to appeal denied, (Tenn. 2008). Further, this court has repeatedly stated that Blakely does not apply retroactively to cases on collateral appeal. See James C. Johnson v. Tony Parker, Warden, No. W2005-01570-CCA-R3-HC, 2006 WL 1168830, at *3 (Tenn. Crim. App. at Jackson, May 2, 2006); Carl Johnson v. State, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at *4 (Tenn. Crim. App. at Jackson, Jan. 25, 2005). The petitioner is not entitled to relief on this issue.

Therefore, we conclude that the trial court did not err in dismissing the petitioner's petition for post-conviction relief. Accordingly, the State's motion is granted. The judgment of the trial court is affirmed pursuant to Rule 20, Rules of the Court of Criminal Appeals.

NORMA McGEE OGLE, JUDGE